

2000

# Edith K. Lyman and Karl R. Lyman v. Howard F. Hatch and Leland G. Brooks : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH  
SEP 17 1975

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

EDITH K. LYMAN, and  
KARL R. LYMAN,

Plaintiffs -  
Respondents,

vs.

HOWARD F. HATCH, and  
LELAND G. BROOKS,

Defendants -  
Appellants

Case no.  
14164

BRIEF OF APPELLANTS

AN APPEAL FROM THE DECISION OF  
THE HONORABLE MAURICE HARDING  
JUDGE, FOURTH JUDICIAL DISTRICT  
COURT, UTAH COUNTY, STATE OF  
UTAH

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**FILED**  
SEP 11 1975

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

---

EDITH K. LYMAN and	:	
KARL R. LYMAN,	:	
	:	
Plaintiffs - Respondents,	:	Case No.
vs.	:	
	:	14164
HOWARD F. HATCH and	:	
LELAND G. BROOKS,	:	
	:	
Defendants - Appellants.	:	

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BRIEF OF APPELLANTS

Statement of the Nature of the Case

This is an appeal from a non-jury verdict of the Court. The case involved a suit on a Promissory Note.

Disposition in the Court Below

The Trial Court sitting without a jury, determined that the note was a valid obligation and granted judgment for the amount of the note plus attorney's fees and costs of Court.

Relief Sought on Appeal

The appellant prays for reversal of the

Trial Court decision and a finding from the evidence that there was a failure of consideration for the note and that the same was unenforceable.

Statement of the Facts

In the year 1971 and for some years prior thereto, the defendant, Howard F. Hatch was with his wife, the owner and operator of a real estate firm incorporated in the State of Utah under the name Equitable Realty, Inc. In the year 1972, the plaintiff, Karl Lyman and another gentleman, Joseph A. Jenkins entered into the business, each of them contributing assets in certain real properties and obtaining in return therefor, a one-third interest each in Mr. Hatch's business.

Of particular interest because of subsequent events was the fact that one of the major properties brought into the corporation by Lyman and Jenkins was an apartment house known as the Robinson Apartments in Provo, Utah.

After operating together as a closed corporation for approximately two years, the plaintiff, Lyman and Mr. Jenkins withdrew from Equitable Realty, Inc. and the parties entered into an agreement dated March 24, 1973 in which a division of all of the property of the corporation

was effected.

A dispute had arisen between the parties involving among other things the accounting for various properties, among them the Robinson Apartments. The apartments had actually been acquired by Lyman and Jenkins in a real estate transaction in which Hatch was the realtor and as a part of the transaction, Hatch was given a note for \$2400.00 in lieu of cash for his real estate commission.

No formal accounting of the firm assets was ever accomplished and the division of their assets was done privately between the three parties. In a prior litigation, filed April 2, 1974, the District Court of Utah County had determined that the windup agreement dated March 24, 1973 was in fact an accord and satisfaction and the Court found that the agreement referred to represented a complete and total settlement among the parties. The Court decision was some two years after the division of the property of the corporation. The note sued on in the present action was signed on May 5, 1973, approximately six weeks after the settlement agreement and eleven months before the prior litigation commenced. The note, having a face value of \$12,000.00, payable by the appellants to the respondents, recited as consideration, "This note is given as payment for

those certain limited partnership shares in Monticello Investors owned by the above parties". (Referring apparently to Karl R. Lyman and Edith K. Lyman, his wife.)

In the trial of the matter, Karl R. Lyman testified that the consideration for the note was the transfer from himself and his wife to the appellants herein of \$12,000.00 worth of limited partnership interest (Trial Transcript P. 3). He testified with respect to the Certificate of Limited Partnership as follows:

"Q (By Mr. Ellis) Mr. Lyman, there is attached to the Certificate of Limited Partnership a list of names of persons who own a limited partnership. Is your name on that list?

A No, sir.

Q Is your wife's name on that list?

A No, sir.

Q Do you know of any subsequent amendment to that document?

A I know an explanation of why it's not here, if that's what you are after.

Q No. Do you know of any amendment to that document at all?

A No, sir.

Q Now between the times that that document was filed, which I believe was the First of September of 1972, between that time and the time that you disposed of your



interest in Equitable Realty, Inc., did you ever acquire any interest from any person whose name is shown on that list as an owner of a limited partnership interest?

A No. sir.

MR. ELLIS: We would offer Defendants' Exhibit Three, Your Honor."

Equitable Realty, Inc. was both a general partner and a limited partner in the limited partnership known as Monticello Investors. (see Trial Transcript, Page 4 and Page 56.)

Equitable's general partnership interest was a twenty per cent interest which it acquired for the services of the corporation in forming the limited partnership arrangement. The limited partnership interest owned by Equitable Realty consisted of a \$16,000.00 equity interest given in exchange for the Robinson Apartments and amounted to a property contribution in the apartment building equivalent to the number of equity shares of limited partnership stock, to-wit: \$16,000.00. (See Trial Transcript, Page 56.) Mr. Lyman admitted in his direct testimony that none of the individual owners of Equitable Realty, Inc. had made any cash or property contribution to the limited partnership. (See Page 10 and 11, Trial Transcript.)

Mr. Lyman further admitted in his testimony that he did not at any time give any consideration for

anything of value to the appellant, Brooks, in exchange for his signature on the note. (See Page 7 and 8, Trial Transcript.)

The only consideration he claimed to have given to Howard F. Hatch was stock which turned out to be the limited partnership stock in Monticello Investors.

ARGUMENT

POINT I

LIMITED PARTNERSHIP INTERESTS MAY  
NOT BE CREATED AS PAYMENT FOR  
SERVICES RENDERED.

The creation of a limited partnership is peculiarly a statutory procedure in the State of Utah which has adopted the Uniform Partnership Act found in Title 48, Chapter 2 of the Utah Code Annotated, 1953.

Section 48-2-4 of the Partnership Act of Utah states:

"CHARACTER OF LIMITED PARTNER'S CONTRIBUTION -  
The contributions of a limited partner may  
be cash or other property, but not services."  
(Emphasis added)

Although this section has never been construed in the State of Utah, the commentaries on the Uniform Limited Partnership Act are uniform in providing that "contributions of a limited partner may be cash or other property but not services." (See 60 Am Jr 2d, Section 378 at Page 260; 68 CJS, Section 456 at Page 1010.)

The mandate of the statute is too plain to require any specific delineation. Any claimed limited partnership interest flowing from anything other than a cash or property contribution is therefore illegal and void. (See Great American Indemnity Company vs. Berryessa, 248 Pacific 2d 367.)

Karl R. Lyman, the main plaintiff herein admitted without equivocation that his name did not appear on the Certificate of Limited Partnership as one of those persons owning a limited partnership interest. (See Trial Transcript, Page 6.) He also admits that his wife, the other plaintiff, was not shown on that list.

Since the sole claim of consideration for the Note was the claimed conveyance of limited partnership interest in the Monticello Investors Limited Partnership, the Lower Court erred as a matter of law in allowing credit to the plaintiffs-respondents for consideration in the form of an illegal limited partnership interest.

#### POINT II

A PURPORTED ASSIGNMENT OF LEGAL PARTNERSHIP INTEREST IS VOID UNLESS IT MEETS THE STATUTORY PREREQUISITES FOR AN ASSIGNMENT.

The Utah State law with respect to limited partnerships provides for the assignment of a limited

partnership interest in Section 48-2-19 UCA 1953 as amended in the following words;

"A limited partner's interest is assignable.

A substituted limited partner is a person admitted to all the rights of a limited partner who has died or has assigned his interest in a partnership . . . .

An assignee shall have the right to become a substituted limited partner, if all the members (except the assignor) consent thereto, or if the assignor, being thereunto empowered by the certificate, gives the assignee that right.

An assignee becomes a substituted limited partner when the certificate is appropriately amended in accordance with Section 48-2-25."

It is interesting to note that only one Certificate of Limited Partnership for Monticello Investors is in existence, that being one dated September 1, 1972 which is a part of the exhibits in the Trial Court.

Paragraph 10 of that Certificate reads as follows:

"Each limited partner has the right to substitute another limited partner in his place only after first offering his partnership interest, upon thirty (30) days written notice, first to the general partner, and if refused, to the other limited partners so as to affect a right of first refusal. The new partner would also have to be approved before achieving full limited partnership status."

Mr. Lyman claims that he owned a \$12,000.00

limited partnership interest in Monticello Investors because he claimed that each of the three part-owners of Equitable Realty, Inc. owned \$4,000.00 worth of the \$12,000.00 limited partnership owned by that corporation.

He is, of course, mistaken as to the law since the shareholders of the corporation do not own a proportionate share of an asset which is a corporate asset. (See authorities in Point III.)

He admits that the corporation's accountant informed the three owners of the corporation that they could not hold the limited partnership shares in their own names. (See Trial Transcript, Page 9.)

Mr. Lyman further complicates and confuses his claimed interest which he purports to have sold to the defendants herein because of additional shares that he acquired of the limited partnership interest from Mr. Jenkins, (See Trial Transcript, Page 11,) but the same principle and law would apply to Jenkins as to Lyman.

Under the law of the State of Utah, such purported assignment and transfer was void for two reasons.

The first is that the Certificate of Limited Partnership itself prevented any such informal assignment; and secondly, the Utah State Statutes in 48-2-19 and

48-2-25 require as a condition precedent to a valid assignment of limited partnership interest, compliance with the amendment procedure of the Limited Partnership Act. No such compliance ever occurred, or was even alleged.

POINT III

THE OWNERS OF A CORPORATION ARE NOT  
THE OWNERS OF THE CORPORATIONS'  
PROPERTY.

The partnership interest in question, consisting of a limited partnership interest of \$16,000.00 actually belonged at no time to the three individual owners of Equitable Realty, Inc. but were in fact a corporate asset. (See the Trial Transcript, Page 56 and Page 54.)

Mr. Lyman assumed that because he owned one-third of the corporation that he was entitled to take credit for one-third of the limited partnership interest in Monticello Investors. Such a result would be contrary to law and invalid.

"Stockholders are not owners of the property of the corporation, the corporation itself being a person whose ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members."  
Junius C. Klein vs. Board of Tax Supervisors  
282 US 19, 75 L. ed. 140, 51 S. Ct 15.

". . . that the corporation has a personality

distinct from that of its shareholders, and that the latter neither own the corporate property nor the corporate earnings."

Miller vs. McColgan 17 Cal 2d 432, 110 P 2d 419 Cal S. Ct.

"A stockholder owns no part of the assets of the corporation."

Long vs. Rike 50 F 2d 124, 81 ALR 521, cert den. 284 US 657, 75 L. ed 557, 52 S. Ct. 35 81 ALR 531.

See also 18 Am Jur 2d Corporations Section 209, PP 737-8; and 18 Am Jur Corp. Section 486, PP 979 - 980; and Utah State Bldg Com. vs. Great American Ins. Co. 105 Ut 11, 140 P 2d 763.

In this respect, it is interesting to note the genesis of the rights represented by the Robison Apartments. (See Trial Transcript, Page 53,) where it is pointed out that the Robinson Apartments were owned originally by Mr. Lyman and his partner, Mr. Jenkins, until March of 1971. They in turn sold this property to Equitable Realty, Inc. in May of 1971, exchanging their equity for shares of corporate stock.

After the corporation known as Equitable Realty, Inc. acquired the Robinson Apartments, it conveyed those apartments to the limited partnership designated as Monticello Investors and received credit for that contribution but no partnership interest was actually put in the name of Equitable Realty, Inc. (See Trial Transcript, Page 55.)

The reason that no limited partnership interest ever showed the name of Equitable Realty, Inc. was that the interest was carried under the name of the accountant, Mr. Gilbert. Both Mr. Gilbert and Mr. Hatch testified that Gilbert had planned to exchange a property owned by Gilbert in Springville, worth \$56,000.00, for the \$16,000.00 limited partnership interest of Equitable Realty, Inc., plus \$40,000.00 worth of undeveloped lots belonging to the same corporation. (See Trial Transcript, Pages 57 and 58.)

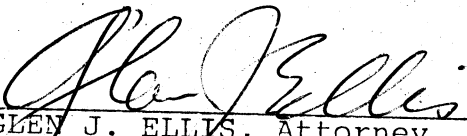
Gilbert, of course, explained that the effort to "distribute" corporate assets among the corporate owners would not be acceptable to the IRS, it likewise would have been unlawful.

#### CONCLUSION

The plaintiff, Lyman erred in the law in assuming to convey to defendants some limited partnership interest in a statutory limited partnership which he claimed to have acquired for services rendered in setting up the partnership. The Trial Court likewise erred in concluding that there was consideration for the note, when in law and fact there was not.

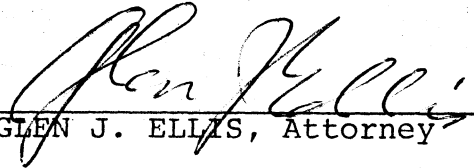
Respectfully submitted this 10th day of September, 1975.



  
GLEN J. ELLIS, Attorney  
Defendants- Appellants,  
Howard F. Hatch and  
Leland G. Brooks

Mailing Certificate

Mailed 10 copies of Appellants' Brief to the Utah Supreme Court, Utah State Capitol Building, Salt Lake City, Utah; and 2 copies to Dallas H. Young, Jr., Attorney for Respondents at 48 North University Avenue, Provo, Utah 84601, postage prepaid this 10<sup>th</sup> day of September, 1975, at Provo, Utah.

  
GLEN J. ELLIS, Attorney

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